

States of Guernsey**EMPLOYMENT & DISCRIMINATION TRIBUNAL****APPLICANT:** Mr M Greening

Represented by: Mr G Greening

RESPONDENT: iQ Music & Computer Solutions Ltd

Represented by: Mr P Rehel

Decision of the Tribunal Hearing held on 21 February 2013**Tribunal Members:** Mrs C Latham (Chairman)

Mr P Woodward

Mr R Brookfield

DECISION

Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of Section 5(2)(a) of the provisions of The Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed.

When calculating the award under Section 22(1)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, the Tribunal determined that the Applicant's pay during the six months prior to the termination of his employment was £12,492.85.

However, the Tribunal further concluded that it would be just and equitable to use its discretion under Section 23(2) of The Employment Protection (Guernsey) Law 1998, as amended, to reduce the six month award of compensation by 65%.

Amount of Award: £4,372.50

Mrs C Latham

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Signature of the Chairman

28 March 2013

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Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal's Decision (Form ET3A) are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended.

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Mr Mathew Greening (MG) was represented by Mr G Greening (GG) and gave evidence to the Tribunal.
- 1.2 Mr G Greening was placed under oath, in the event that he gave evidence.
- 1.3 All other persons who gave oral evidence to the Tribunal were also placed under oath /affirmation.
- 1.4 The Applicant presented 17 witness statements, shown in the index to document bundle EE1.
- 1.5 The Respondent, iQ Music and Computer Solutions Limited, was represented by Mr Paul Rehel (PR). He gave evidence under oath.
- 1.6 The Respondent called the following witnesses:
 - Mr O Shepherd (OS)
 - Mr M Rancans (MR)
 - Mr W Wilsenach (WW)
 - Mr J Dodsworth (JD)
 - Mr T Burden (TB)
 - Mr T Evans (TE)

2.0 Findings of Fact

- 2.1 The following facts have been derived from the evidence presented by the Applicant and by the Respondent, Forms ET1 and ET2 and attachments thereto; document bundles EE1, EE2, EE3, EE4 and ER1; and documents provided to the Tribunal.
- 2.2 Although all submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgement or not, the Tribunal noted the following key points:
- 2.3 The Applicant was employed by the Respondent from 10 January 2010, initially with the job description of “sales person” and was promoted to the position of “general manager” in May 2011. His responsibilities included running the retail business on a day-to-day basis, staff supervision, and customer sales and after-sales service. He was the only person in the Guernsey business who was permitted to drive the company motor vehicle and as a result was often out of the shop dealing with deliveries and after-sales visits.

- 2.4 The Respondent set up its Guernsey business in 2006 and trades as an “Apple Premium re-seller”. It has retail premises in St Peter Port and employs six staff. Its sister Company, located in Jersey, employs 17 people and has overall senior management responsibility for the Guernsey business.
- 2.5 During a period of several weeks in spring or early summer 2012, the Respondent’s senior managers became concerned about the Applicant’s time keeping and recording of his work attendance on time sheets from which his salary was calculated. Neither TE nor PR could be precise about the exact date when they first became concerned.
- 2.6 In 2012, employees at the Guernsey shop (all of whom reported to MG as store manager) observed occasions when, without notice, MG was late for work, had to be telephoned at home to remind him to attend call outs, missed appointments with customers or had not turned up for work at all. He was observed by the staff driving on the island with his girlfriend whilst on sickness absence and was observed surfing on another occasion when he should have been at work. He also claimed to be working from home when, on the following day at the store, the staff observed that he undertook the work he had claimed to have fulfilled whilst working from home the previous day.
- 2.7 On 14 July 2012, a staff member (MR) sent an email to the management in Jersey (PR) making complaints about the Applicant’s time keeping, attendance at work, failure to attend appointments on time and the impact of his behaviour on staff members. He described MG’s timekeeping as “never here”. MG had to be wakened with a telephone call on 12 July 2012 to remind him of a 10 o’clock appointment. MG called briefly at the shop to collect certain items. Later he called the shop to say that he was not returning and would work on Saturday 16 July instead.
- 2.8 On 15 July 2012, MG called the shop and informed OS that he would be taking the day off because he was tired.
- 2.9 On 16 July, PR and MR discussed the contents of the email and it was agreed that an investigation would be undertaken. MR would keep a log of the Applicant’s attendance and work activities. TE spoke with MR, who agreed to help with the investigation.
- 2.10 On 18 July 2012, PR informed OS of the situation. OS confirmed that MG had not been at work on 12 July 2012. MG’s timesheet showed that he worked from 08.30 – 17.30.
- 2.11 On 23 July 2012, all members of staff, including MG, were sent an email reminding them to check their last four weeks’ timesheets.
- 2.12 On 24 July 2012, PR and TE attended the Guernsey store. On arrival they requested a meeting with MG in the upstairs training room. At the meeting MG was informed that it was believed that he had been taking unscheduled days off work and creating false time sheet entries for 30 June, 12 July and 18 July 2012. MG was handed an email to read.
- 2.13 The evidence presented to MG was:

- 2.13.1 On 30 June 2012 the time sheet entry was eight hours. Other staff confirmed that he had not been in and had been to a surfing lesson.
- 2.13.2 On 12 July 2012 the time sheet entry was eight hours. He had to be called at home at 10 a.m. to be reminded to attend an appointment as he had not come into work. After the call out he did not return to work.
- 2.13.3 On 18 July 2012 the time sheet entry was eight hours. Staff had sent a message to senior managers stating "He arrived at 10.15 then left again at 11.45 to check on van after that nobody heard from him until 14.15 when he said he was going to get his jeep from his mums to use for work. He then said he had some other jobs and might not come back, we haven't seen him since".
- 2.14 MG was told that these actions were deemed to be gross misconduct. His response was "What, are you sacking me?" TE informed him that he should either resign or "we sack you and prosecute you for fraud".
- 2.15 MG returned his keys and went home.
- 2.16 On 25 July 2012, PR wrote to MG confirming the dismissal.

3.0 The Law

The Law referred to in this section is The Employment Protection (Guernsey) Law, 1998, as amended.

- 3.1 In determining whether the dismissal of an employee was fair or unfair, Section 6(1) of the Law notes that "it shall be for the employer to show (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and (b) that it was a reason falling within subsection (2)" and Section 6(2) notes "For the purposes of subsection (1)(b), a reason falling within this subsection is a reason which (b) related to the conduct of the employee".
- 3.2 Section 6(3) of the Law notes "Where the employer has fulfilled the requirements of subsection (1), then, subject to the provisions of sections 8 to 14 and (15I), the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case."
- 3.3 Section 22(1) of the Law notes "Subject to the provisions of section 23, the amount of an award of compensation for unfair dismissal is a sum equal to – (a) six months' pay, ..." and Section 23(2) of the Law notes "Where in relation to such a complaint the Tribunal considers that, by reason of any circumstances other than those mentioned in subsection (1), it would be just and equitable to reduce the amount of the award of compensation for unfair dismissal to any extent, the Tribunal shall, subject to subsection (3) and subsection (4), reduce that amount accordingly."

- 3.4 Section 31(9) of the Law notes “A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Law before the Tribunal any code of practice issued under this section shall be admissible in evidence, and if any provision of the code appears to the Tribunal to be relevant to any question arising in the proceedings (including, without limitation, any question as to whether an employer has acted reasonably or unreasonably for the purposes of section 6(3)) that provision shall be taken into account in determining that question.”

4.0 Conclusion

- 4.1 In any claim of unfair dismissal where a dismissal is proven to have taken place, the burden of proof lies with the Respondent to prove the reason for the dismissal and also that the dismissal was fair.
- 4.2 In its letter of dismissal to the Applicant dated 25 July 2012, the Respondent stated that he was being dismissed on the grounds of gross misconduct as a result of the Applicant's submission of false time sheet entries.
- 4.3 Credible evidence was given by MG's co-workers. In particular, the Tribunal gave weight to the evidence given by OS and MR who gave details regarding MG's time keeping, the staff's dissatisfaction and frustration with regard to his attitude to work and their embarrassment and frustration when dealing with customer complaints. They described many occasions when MG was late for work and had to be reminded to attend call outs.
- 4.4 The senior managers appear to have been either unaware or failed to manage the problems in the Guernsey shop. It was not until an email was sent to them, on 14 July 2012, by MR that they decided to investigate the complaint and involve MR and OS in monitoring the Applicant's timekeeping.
- 4.5 Once the investigations were concluded, there were three specific dates on which the Applicant's time sheets appear to have been falsified. It was quite reasonable for the Respondent to follow up these results with the Applicant. The Respondent decided to meet with MG. This meeting was held at no notice to the Applicant. The meeting failed to follow any due process and it blatantly disregarded the Company's own procedures set out in its Employee handbook.
- 4.6 The Tribunal placed weight on MG's evidence regarding the meeting in which he described how he was called in to see PR and TE. He was given no advance warning or reason why the meeting was to be held. He was not given the opportunity to be accompanied by a co-worker or friend. At the meeting, he was informed that because he had falsified his timesheets he was guilty of misconduct and was given the opportunity to be dismissed or hand in his resignation.
- 4.7 In his evidence, MG explained his version of events on the three specific dates. He also explained the entries on his timesheets and his errors on at least two of the three dates. He claimed that he “had made a mistakeit was not intentional” and “poor management on my part”. His explanation for the entries on the time sheet

on 18 July 2012 was not considered by the Respondent to demonstrate appropriate behaviour.

- 4.8 The Tribunal considered all of the Applicant's evidence and concluded that it was within the range of reasonable responses for the Respondent to act on its belief that the timesheets were falsified and that the Applicant had deliberately made incorrect entries on the three dates in question.
- 4.9 The Tribunal also considered the reasonableness of the Respondent's actions with regard to the procedures it followed in relation to the process of dealing with the Applicant's alleged conduct. Although the Respondent Company is not a large organisation, it is a substantial small business with over 20 employees between the Respondent and its sister Company in Jersey. It has an Employee Handbook setting out Company Policies and which makes reference to Disciplinary Procedures and Gross Misconduct. The Handbook makes specific reference to being compliant with Guernsey Employment Law and makes reference to the Employment Service website.
- 4.10 It is reasonable, therefore, to expect a fair process for dealing with such matters. The Respondent was aware that there were expectations under the Law and, to this end, PR gave evidence that he had sought advice on the subject.
- 4.11 Clear guidance is given by both the Discipline at Work Advisory booklet and the Code of Practice (Disciplinary Practice and Procedures in Employment) as to the reasonable behaviour and procedures expected from an employer in the dismissal of an employee. These are both freely available from the Commerce and Employment Department and the guidance is applicable to all employment situations. The Tribunal is surprised that even though the Respondent made contact with the Department, it did not avail itself of the information available.
- 4.12 The Tribunal has compared the processes of the Applicant's dismissal with the Code of Practice and has concluded that even the most fundamental procedures to ensure natural justice for the Applicant were not followed. At the very least, the Applicant should have been given proper and explicit reasons for the meeting that took place on 25 July 2012. He should also have been afforded the opportunity to be accompanied and given the ability to appeal the decision of that meeting. None of these were made available to the Applicant.
- 4.13 Overall, the Tribunal concluded that the Respondent's procedural failings in this particular case were sufficiently serious in nature to render a potentially fair dismissal unfair. A reasonable employer with similar resources available to it would, following the investigations of incorrect entries on the timesheets, have instigated an appropriate disciplinary process that would have resulted in a fair dismissal. In light of this, the Tribunal further concluded that the Respondent's decision, to dismiss the Applicant on the grounds of gross misconduct was not, having given careful consideration to all the circumstances surrounding this case, the decision of a reasonable employer.

5.0 Decision

- 5.1 The Applicant claimed that he had been unfairly dismissed. The Respondent argued that it had dismissed MG fairly, within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended, by reason of his conduct.
- 5.2 Having considered all of the evidence put before it, the Tribunal accepts that, in view of the Respondent's genuine belief that the Applicant had committed gross misconduct, it had been within the band of reasonable responses for the Respondent to dismiss the Applicant. However, the failings in the disciplinary process followed by the Respondent were sufficiently significant to render this dismissal unfair and outside of the range of actions expected of a reasonable employer.
- 5.3 The Tribunal finds that, in light of the considerations detailed above, the Applicant was unfairly dismissed.
- 5.4 The Tribunal further finds that in view of the circumstances of the dismissal, it would be just and equitable to use its discretion to reduce the award by 65% (sixty-five percent), as provided for by section 23(2) in The Employment Protection (Guernsey) Law, 1998, as amended.

6.0 Award

- 6.1 An award of £4,372.50 is ordered. This amount has been determined by reference to the Applicant's salary in the final six months of his employment, as determined by the Tribunal, and takes into account the reduction of the award noted in 5.4 above.

Mrs C Latham

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Signature of the Chairman

28 March 2013

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Date